BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

DAROLD E. MILLER	)	
Claimant	)	
	)	
V.	)	
	)	
BETHEL BAPTIST CHURCH	)	
Respondent	)	Docket No. 1,065,743
	)	
AND	)	
	)	
CHURCH MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the August 1, 2014, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Board heard oral argument on December 9, 2014. Paul D. Post of Topeka, Kansas, appeared for claimant. Jeffrey A. Mullins of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The ALJ found claimant failed to prove the existence of an employer/employee relationship with respondent on or before April 5, 2013. The ALJ determined the working relationship between claimant and respondent was "more akin to that of independent contractor/contractee and not employer and employee."[1] Claimant's request for benefits under the Workers Compensation Act was denied.

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

Claimant argues he met with personal injury by accident arising out of and in the course of his employment with respondent on April 5, 2013. Claimant contends the accident was the prevailing factor in his injury, medical treatment, and permanent impairment of 34 percent to the right upper extremity. Claimant maintains his average

[1] ALJ Award (Aug. 1, 2014) at 6.

weekly wage was $540.00 per week. Further, claimant argues he is entitled to payment of temporary total disability benefits and payment of all medical bills incurred as a result of his injury.

Respondent contends the evidence indicates claimant was acting as an independent contractor on the date of accident, not an employee. Respondent argues the ALJ's Award should be affirmed in all respects.

The issues for the Board's review are:

1. Was claimant an employee of respondent on or before April 5, 2013?

2. If so, did claimant's injury arise out of and in the course of his employment with respondent?

3. What is the amount of claimant's average weekly wage, if any?

4. What is the nature and extent of claimant's disability?

5. Is claimant entitled to payment of temporary total disability benefits, any and all unpaid medical bills related to the accident, and/or future medical treatment?

FINDINGS OF FACT

Claimant currently works full-time as a forklift driver for Holman Distribution Center (Holman) in Emporia, Kansas. In April 2013, claimant worked for Holman through The Arnold Group, a temporary placement service. Holman later hired claimant directly.

Claimant is not a member of respondent, though he attends church services on occasion. Claimant's father, Gaylerd Miller (Mr. Miller), is a member of respondent and served on respondent's board in 2013. The church board is responsible for the upkeep of respondent's facilities and grounds. Mr. Miller was the member usually chosen for matters regarding respondent's maintenance due to his history in construction.

Respondent's property lies adjacent to property owned by The Medicine Shoppe. The Medicine Shoppe had purchased this property from a school and planned to construct a new building on the site. The Medicine Shoppe's owner asked respondent if it would remove two large trees on respondent's property, as they were near the boundary line and The Medicine Shoppe's owner did not want to risk one falling on his new building.

The church board, including its leader, Pastor Joe Tuttle, agreed the trees should be removed. Mr. Miller testified the pastor asked him what should be done, as respondent could not afford to hire someone to remove the trees. Mr. Miller picked the date on which the project would be done and obtained 10-15 volunteers to help with the tree removal.

Respondent did not provide training for the volunteers. Mr. Miller stated that he did not tell any of the volunteers "how to cut down anything."[2]

Claimant testified his father, Mr. Miller, approached him about assisting with the tree removal. Claimant said:

> He came up to ask me if – if I'd be interested in some wood, and I said yeah. He goes, well, the church wants to take down these trees, and if you let me use your stuff and come and help, I'll let you have – have the wood.[3]

Claimant uses a wood-burning stove to heat his home. He stated obtaining the wood was his incentive to bring his equipment and remove the trees.

In addition to his chain saw, claimant also provided two trucks and Mr. Miller's trailer for the tree removal. Claimant explained he owns a grain truck, which is similar to a dump truck. The grain truck was previously used in building a parking lot and already on respondent's property. Claimant drove his other truck, with Mr. Miller's trailer attached, to respondent's property for the tree removal project. Claimant testified Pastor Tuttle provided fuel for the grain truck, and Mr. Miller provided fuel for claimant's Ford.

On or about Saturday, March 30, 2013, claimant and church member Jim Finney cut down the trees. They cut the wood into manageable pieces for transport to claimant's house. Claimant stated he received approximately 4 to 5 cords of wood from the project. Each cord has an estimated value of $80-$120. No one, other than claimant, received anything for volunteering time to the tree removal.

Claimant testified he did not supervise any volunteers nor tell them how to do the job. Claimant confirmed respondent did not provide training on how to complete the project or accomplish the task. Respondent did purchase lunch for some of the volunteers involved. Claimant approximated he worked on the project from 8:00 a.m. to 5:00 p.m. on that day.

While having lunch together the following Friday, April 5, 2013, Mr. Miller, Pastor Tuttle, and claimant discussed the stumps that remained on the property after the trees were felled. Pastor Tuttle paid for the meal. Mr. Miller testified Pastor Tuttle decided during lunch that the stumps would be removed that day, and claimant was informed he could keep the resulting wood. Claimant was told to cut the stumps as close to the ground as possible. Claimant suffered an injury to his right hand while cutting a stump.

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[2] R.H. Trans. at 32.

[3] *Id*. at 38.

Claimant explained he was on his knees while cutting the stump parallel to the ground. The chain saw kicked back, causing claimant to lose his balance and cut his right thumb and all four fingers. He described the incident:

> Well, being down so low and I was changing position, and when I changed position, my leg slipped, and when my leg slipped, it forced [the right] hand to go down which is the one that got cut.
>
> . . . .
>
> And I was holding the throttle with [the left] hand and so the chain saw kept going and that kicked the saw back towards me and that's what got my hand.[4]

Claimant was immediately taken to the Newman Regional Health (Newman) emergency room by his parents, who were on the scene at the time of the accident. Claimant's right hand was evaluated, x-rayed, and bandaged before staff at Newman sent him to Wichita for further treatment. Claimant's wife drove claimant to the emergency room at Wesley Medical Center, where claimant's right hand was stitched and claimant was referred to Dr. Gluck, a hand specialist.

Claimant returned to Wichita the following day and met with Dr. Gluck. Claimant testified Dr. Gluck wanted claimant to undergo surgery "right away."[5] Dr. Gluck performed a debridement of lacerations of the right thumb and all fingers and a repair of extensor tendon lacerations of the second, third, and fourth fingers on April 9, 2013. Claimant followed up with Dr. Gluck postoperatively before his eventual release. Claimant stated he did not undergo physical therapy during his recovery. Claimant was unable to work at Holman for seven weeks as a result of the injury and subsequent treatment. Claimant testified he was not paid during those seven weeks.

Dr. Peter Bieri, a physician, evaluated claimant on November 12, 2013, at the request of claimant's attorney. Claimant was under no active medical care at the time of the evaluation. Dr. Bieri reviewed claimant's medical records and history, noting claimant denied any pertinent history of injury to the right hand prior to April 2013. After performing a physical examination, Dr. Bieri indicated claimant suffered a loss of range of motion of the right fingers, loss of sensation in the fingers and thumb, and marked loss of strength with gripping and grasping. Claimant complained of "persistent discomfort, aggravated by cold temperature."[6]

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[4] *Id*. at 46-47.

[5] Claimant's Depo. at 45.

[6] Bieri Depo., Ex. 2 at 3.

Dr. Bieri determined claimant was at maximum medical improvement, with his impairments permanent and stabilized. Using the AMA *Guides*,[7] Dr. Bieri found claimant has a combined total right upper extremity impairment of 34 percent. Dr. Bieri further opined, "The injury in question is considered to be the prevailing factor for the diagnosis rendered, treatment given and residual permanent impairment."[8]

Dr. Bieri testified claimant was advised of possible future surgical interventions by Dr. Gluck. On cross-examination, Dr. Bieri agreed his November 12, 2013, report had no mention of any possible recommended procedures by Dr. Gluck. Dr. Bieri testified:

> Q. Is that something that [claimant] told you verbally and you recalled it now?
>
> A. Yes. He had asked if anything could be done, particularly as far as additional surgical intervention. I asked him what his tending surgeon had told him and he said that essentially something to the fact you can always reoperate on these areas but results are generally not good as far as improvement. And I would agree with that. I would not recommend any surgical intervention to him. It's always a possibility, but in this instance it's very unlikely.[9]

Claimant testified his right hand was his dominant hand until the injury. He stated he cannot make a complete fist with his right hand, nor can he grip tightly due to its weakness. Claimant said he must use his left hand, though his strength is limited on the left. He said, "I'm limited, you know, if something happens, I have to grip something real hard or hold something a long period of time, I can't do it."[10] Claimant indicated he is able to perform his work at Holman, and continues to work for Holman full-time.

PRINCIPLES OF LAW

K.S.A. 2012 Supp. 44-501b(c) states, in part:

> The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends.

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[7] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] Bieri Depo., Ex. 2 at 4.

[9] Bieri Depo. at 11.

[10] R.H. Trans. at 51.

K.S.A. 2012 Supp. 44-508(b) states:

> "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include, but not be limited to: . . . volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a, and amendments thereto, such terms shall not include individual employers, limited liability company members, partners or self-employed persons.

K.S.A. 2012 Supp. 44-508(h) defines burden of proof:

> "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record . . . ."[11]

It is often difficult to determine in a given claim whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[12]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[13] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used by the parties is not binding when determining whether an individual is an employee or an independent contractor.[14]

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference

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[11] See *Box v. Cessna Aircraft Company,* 236 Kan. 237, 689 P.2d 871 (1984).

[12] See *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[13] See *Wallis v. Sec'y of Kansas Dep't of Human Resources.*, 236 Kan. 97, 102, 689 P.2d 787 (1984).

[14] See *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[15]

In addition to the right to control and the right to discharge the worker, other commonly recognized indicators of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[16]

In *Hill v. Kansas Dep't of Labor, Div. of Workers Comp.,*[17] the Court of Appeals stated the court primarily applied the "right to control test, but generally considered several additional factors, including:

> (1) [t]he existence of the right of the employer to require compliance with instructions;
>
> (2) the extent of any training provided by the employer;
>
> (3) the degree of integration of the worker's services into the business of the employer;
>
> (4) the requirement that the services be provided personally by the worker;
>
> (5) the existence of hiring, supervision, and paying of assistants by the workers;

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[15] See *Wallis, supra*, at 102-03; citing *Jones*, *supra*, at 780.

[16] See *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994). (The list was expanded to 20 in *Hill v. Kansas Dep't of Labor, Div. of Workers Comp*., 42 Kan. App. 2d 215, 222-23, 210 P.3d 647 [2009] aff'd in part, rev'd in part, 292 Kan. 17, 248 P.3d 1287 [2011].)

[17] *Hill, supra.*

(6) the existence of a continuing relationship between the worker and the employer;

(7) the degree of establishment of set work hours;

(8) the requirement of full-time work;

(9) the degree of performance of work on the employer's premises;

(10) the degree to which the employer sets the order and sequence of work;

(11) the necessity of oral or written reports;

(12) whether payment is by the hour, day or job;

(13) the extent to which the employer pays business or travel expenses of the worker;

(14) the degree to which the employer furnishes tools, equipment, and material;

(15) the incurrence of significant investment by the worker;

(16) the ability of the worker to incur a profit or loss;

(17) whether the worker can work for more than one firm at a time;

(18) whether the services of the worker are made available to the general public;

(19) whether the employer has the right to discharge the worker; and

(20) whether the employer has the right to terminate the worker.[18]

ANALYSIS

The ALJ found claimant to be an independent contractor, not an employee of respondent. The Board agrees. Claimant was simply doing his father a favor and agreed, along with 15 others, to help cut down two trees and haul away the wood. He was not an employee of the church.

Reviewing the factors outlined in *McCubbin v. Walker*,[19] if there was a contract, it was a fixed price contract in which claimant agreed to help at the church in exchange for wood. Claimant provided his own tools. Claimant was in complete control of the manner in which he performed the work. Respondent did not exercise control over claimant.

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[18] *Hill, supra,* at 222-223.

[19] *McCubbin, supra.*

Respondent did not hire claimant. Mr. Miller and claimant agreed that claimant was not respondent's employee. If he was paid, Claimant was paid by the job, in wood, and not for his time. Cutting wood was not a part of respondent's regular business.

Reviewing the additional factors in *Hill,* respondent did not have the right to require claimant to comply with instructions. No training was provided by respondent. There was no continuing relationship between the worker and the employer. There were no set work hours. There was no requirement for full-time work. Claimant had a full-time job elsewhere that did not include cutting trees for respondent.

Considering all the factors surrounding claimant's injury and relationship to respondent, claimant failed to meet the burden of proving he was an employee of respondent for the purpose of coverage under the Kansas Workers Compensation Act.

CONCLUSION

Claimant failed to meet the burden of showing he was an employee of respondent for the purpose of coverage under the Kansas Workers Compensation Act. All other issues are moot.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Brad E. Avery dated August 1, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of December, 2014.

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BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Paul D. Post, Attorney for Claimant
paulpost@paulpost.com

Jeffrey A. Mullins, Attorney for Respondent and its Insurance Carrier
ecruzan@mulmc.com

Brad E. Avery, Administrative Law Judge